IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. .....

ALUMINUM COMPANY OF AMERICA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

There are set forth in the foregoing petition, and incorporated at this point by reference, statements as to the opinions of the courts below (p. 1), the grounds upon which the jurisdiction of this Court is invoked (p. 2), the statute involved (p. 2), and the material facts (p. 3).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the petitioner, a supplier of materials, was liable as a "subcontractor" under the Vinson Act

(a) with respect to its contracts with prime contractors, and

(b) with respect to its contracts with subcontractors and materialmen.

2. In holding that the petitioner was precluded, by reason of its failure to petition for review of the decisions of the Board of Tax Appeals, from urging in support of those decisions grounds presented to the Board

(a) in one proceeding in which the Board decided that there was no deficiency, and

(b) in another proceeding in which the Board decided that there was a deficiency which the respondent, petitioner on review, sought to have increased.

3. In failing to hold, and to instruct the Tax Court of the United States, that in determining excess profit, the materials used are to be included in the "cost of performing the contract" at their value on the date of enactment of the Vinson Act.

4. In reversing the decisions of the Board of Tax Appeals.

Argument

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT THE PETITIONER WAS A "SUBCONTRACTOR" UNDER THE VINSON ACT IS IN CONFLICT WITH A DECISION OF THIS COURT UNDER A COMPARABLE STATUTE AND DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Vinson Act limits profit on contracts and subcontracts for the construction and/or manufacture of certain naval vessels or aircraft or any part thereof. It requires every prime contractor to agree, and to require his subcontractors to agree, to pay into the Treasury profit in excess of 10 per centum of the total contract price. The petitioner was a mere materialman who supplied to prime contractors, subcontractors, or other materialmen, regular commercial products which required extensive fabrication by its vendees or by their vendees, resulting in radical distortion in size and shape and conversion into new and different forms, before the materials could be made a part of a naval vessel or aircraft (R. 6-15). The principal question is whether, by reason of these transactions, the petitioner was a "subcontractor".

No question arising under the Vinson Act has ever been passed on by this Court, and no other federal tribunal, except in the case at bar, has ever decided the question raised; except that on August 18, 1942, the Board of Tax Appeals followed its decision in the case at bar in favor of the petitioner in *Aero Supply Manufacturing Corp.* (unofficially reported, Commerce Clearing House, B. T. A. Service, No. 12,820-D). The Commissioner did not seek review of that decision.

The Vinson Act was enacted March 27, 1934, and the profit-limiting provisions of Section 3 were suspended by Section 401 of the Second Revenue Act of 1940, 54 Stat. 1003, 34 U.S.C. §496a, as to contracts and subcontracts completed during the effective period of the excess profits tax. Many cases have arisen, as we are informed, which are pending either before the Bureau of Internal Revenue or in the Tax Court of the United States, whose disposition will be affected by the ultimate decision in the case at bar. The question affects virtually every supplier of materials who during nearly six pre-war years made substantial sales of materials that ultimately found their way into naval vessels or aircraft. The number of such material suppliers must be very large; we know of many in the Pittsburgh district alone. If the question is not disposed of by this Court, it is probable that much avoidable litigation in other circuits will ensue.

The decision of the Circuit Court of Appeals that the term "subcontractor" includes a materialman under the circumstances described is in conflict with the decision of this court in *Clifford F. MacEvoy Co. v. United States,* 64 S. Ct. 890 (not yet officially reported), and with what we believe to be the unanimous judicial authority in federal and state appellate courts.

The petitioner owes no excess profit on its material contracts unless those contracts were "subcontracts" and unless it was, with respect to them, a "subcontractor" within the meaning of the Vinson Act. There is nothing in the statute to indicate that those words were used by Congress in any other than their common, ordinary sense, and that meaning is to be adhered to. "Congress will be presumed to have used a word in its

usual and well-settled sense": *United States v. Stewart*, 311 U. S. 60, 63.

The only decision by this Court construing the term "subcontractor" is *Clifford F. MacEvoy Co. v. United States*, decided under the Miller Act. That Act provides broadly that "Every person who has furnished labor or material in the prosecution of the work provided for in such contract * * * shall have the right to sue on such payment bond;" the Act contains many other references to persons supplying material. It contains a proviso, however, "that any person having direct contractual relationship with a subcontractor" shall have a right of action on the payment bond. The Circuit Court of Appeals recognized that the proviso appeared to be in conflict with the remainder of the statute, and declined to give it any limiting effect. Accordingly, it held that one who supplied materials to a materialman had a right of action on the payment bond, because the term "subcontractor" should be liberally construed to include a materialman, in order to effectuate what it conceived to be the Congressional intent. *United States v. Clifford F. MacEvoy Co.*, 137 F. (2d) 565. This Court granted certiorari and reversed the judgment. In the instant case, the statute contains no such broad language, nor any reference to persons who furnish material, as the Miller Act does, yet the Circuit Court of Appeals, in a decision filed four days after this Court's decision in *Clifford F. MacEvoy Co. v. United States*, adhered to its former view and held that the petitioner, which did nothing more than supply ordinary materials, was a "subcontractor" within the meaning of the Vinson Act.

In its opinion the Circuit Court of Appeals sought to distinguish this Court's decision on the ground that

the term "subcontractor" has no single, exact meaning, and is to be construed so as to effectuate a legislative intent inferred, not from language of Congress, but from the court's view of the purpose of the statute (R. 56-57). The court thought that the Board's interpretation worked a serious discrimination against the Government as a builder of its own naval vessels, because suppliers of materials would sell as little as possible to the Government (R. 56-57). This unsupported view is contrary to that of the Board of Tax Appeals, the "administrative body having special competence to deal with the subject matter": *Dobson v. Commissioner,* 320 U. S. 489, 502. The Board concluded that restricting profit on "common articles, materials and supplies ordinarily purchased on the open market" might make them "practically unobtainable in the market because of the fear of a later forced return of profits", and that "Thus, the Navy might be hampered, not helped." (R. 18). Moreover, the court did not mention any of the numerous decisions of the federal and state courts, in a great variety of situations, construing divers statutes and contracts, on which this petitioner relied, and which the Board followed (R. 18, 20-21). (These decisions are listed in Appendix C, *infra,* p. 42.) We are satisfied that no court of appellate jurisdiction has ever applied the term "subcontractor" to a materialman supplying regular commercial materials requiring substantial further fabrication, except on the basis of special definition of the term in the statute or contract so as to include a materialman. We have examined the cases cited in the annotation at 141 A. L. R. 321, referred to in this Court's opinion in the *MacEvoy* case and relied on by the Circuit Court of Appeals (R. 57), as we have examined every decision

on the subject coming to our notice, and we are confident that the foregoing statement is correct. The conflict exhibited by the cases exists only in a field within which the facts of this case do not fall. The annotation at 141 A.L.R. 321 does show that the line of demarcation between a subcontractor and a materialman is not drawn at the same point by all courts; the conflict is over where the line is to be drawn. But there is no conflict as to the classification to be given this petitioner on the facts found; it would not have been classed as a subcontractor under any of the cases cited in the annotation.

As noted by this Court in the *MacEvoy* case, "Congress has shown its ability in other statutes to make clear an intent to include materialmen within the meaning of the word 'subcontractor' ". No such intent is made clear in the Vinson Act. As this Court also noted, "In other statutes, Congress has clearly used the term 'subcontractor' in contrast to 'materialman' ". Such instances were relied on by the Board (R. 21) but disregarded by the Circuit Court of Appeals. As stated by the Board,

> "The legislation most nearly parallel to the Vinson Act is the Merchant Marine Act of June 29, 1936, 49 Stat. 1998. That act has features resembling both the Vinson Act and the Buy American Act. Its section 505(b) reads:
>
> > No contract shall be made for the construction of any vessel under this act unless the shipbuilder shall agree * * * (5) to make no subcontract unless the subcontractor agrees to the foregoing conditions.

Section 505(a) provides:

> * * * In all such construction the shipbuilder, subcontractors, materialmen, or suppliers shall use, so far as practicable, only articles, materials, and supplies of the growth, production, or manufacture of the United States * * *."

Thus, in parallel legislation passed in 1936 before the disputed regulation of 1937 was promulgated, and using in Section 505(b) the identical language appearing in the Vinson Act, Congress was at pains to subject both subcontractors and materialmen to Section 505(a), while leaving Section 505(b) applicable only to subcontractors.

The decision of the Circuit Court of Appeals so far departs from the ordinary meaning of the term "subcontractor" as established by the decision of this Court and the overwhelming weight of judicial authority elsewhere as to call for its review.

2. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT IN THAT IT APPLIES TO THE PETITIONER A REGULATION WHICH ENLARGED AN ACT OF CONGRESS AND WHICH WAS NOT FOLLOWED IN ADMINISTRATIVE PRACTICE.

The Vinson Act limits the profit to be made on the construction or manufacture of certain naval vessels or aircraft by a "subcontractor". The petitioner, who was a mere materialman, contends, and the Board of Tax Appeals held, that the word "subcontractor" does not apply to the petitioner. The Circuit Court of Appeals relied on a regulation (*infra*, p. 29) issued under the Vinson Act which treated every materialman as a sub-

contractor. In giving effect to the regulation, the Circuit Court of Appeals departed from the applicable decisions of this Court in two important respects:

(a) The respondent Commissioner, in his brief filed in the Board of Tax Appeals, admitted that the term "materialman" is a "distinct legal concept" and that there is a "distinction in fact between subcontractor and materialman", but said that the regulation had "enlarged on the ordinary routine definition" of "subcontractor". The Board noted this admission and held that this "enlargement" by the regulation was not warranted (R. 20). In their Statement of Points to be Relied on, filed in the Circuit Court of Appeals, the Assistant Attorney General and the Chief Counsel, Bureau of Internal Revenue assigned as error the action of the Board "In holding and deciding * * * that the 'enlargement of the ordinary routine definition' [in the regulation] of a subcontractor is not warranted." But, we earnestly submit, it is not the function of the Treasury to "enlarge" an Act of Congress. The present attempt to do so "is an unwarranted extension of the plain meaning of the statute and cannot, therefore, be sustained": *Maass v. Higgins,* 312 U. S. 443, 447. A regulation which "operates to create a rule out of harmony with the statute, is a mere nullity": *Manhattan General Equipment Co. v. Commissioner,* 297 U. S. 129, 134. Any attempts of the Treasury to "enlarge" an Act of Congress is "an attempt to legislate": *Helvering v. Sabine Transportation Co., Inc.,* 318 U. S. 306, 311-312. As Chairman Vinson of the House Committee on Naval Affairs put it, at the very hearings relied on by the Circuit Court of Appeals (R. 60):

> "When we should write anything into the statutes, it is better to do it that way than to leave

it to Department rules and regulations, because the Department's rules and regulations mean one thing and the law means another." (Hearings before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation affecting the Naval Establishment, 1940, 76th Congress, 2nd & 3rd Sessions, p. 3170.)

(b) Administrative construction of a statute to give that construction validity, must be consistent. But in the Circuit Court of Appeals the Commissioner, relying on an opinion of the Legal Division of the Navy Department, disclosed that in practice the term "subcontractor" was limited to one dealing with the prime contractor:

> "It would not appear that in the application of the Vinson-Trammel Act any attempt was made to go beyond the first tier of subcontractors; that is, there is nothing to indicate that it was to be applied to sub-subcontractors" (Appendix A, *infra*, p. 35.)

Under what the Commissioner termed "long-continued administrative construction", none of the petitioner's orders from persons who were not prime contractors would be deemed subcontracts. These involve the great bulk of the profit in this case, and this was pointed out to the court. Further, as noted in its opinion by the Board of Tax Appeals, the practice of both the War and Navy Departments from 1934 to 1941 was to recognize the distinction between a subcontractor and materialman (R. 21-22). Since it appeared from the Commissioner's brief that there has not been "any attempt" since 1934 to apply the regulation to persons not dealing with a prime contractor, the Circuit Court of Appeals erred in saying that the interpretation it adopted had

been uniformly followed." In following the regulation under those circumstances, its decision is in conflict with the decision of this Court in *United States v. Pleasants*, 305 U. S. 357, 363. It was there held that "The administrative construction invoked by the Government has not been of a sufficiently consistent character to afford adequate support for its contention."

3. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT IN THAT IT REFUSED TO ALLOW THE PETITIONER, THERE RESPONDENT ON REVIEW, TO SUPPORT THE DECISIONS OF THE BOARD OF TAX APPEALS ON GROUNDS PRESENTED TO THE BOARD.

The Circuit Court of Appeals held that the petitioner, which was the respondent on review in that court, had lost the right to support the decisions on grounds presented to the Board of Tax Appeals, because it had failed to petition for review. This holding is important to federal procedure and is in conflict with applicable decisions of this Court.

In the case for the year 1936, Docket No. 103,316 in the Board, the petitioner contended that it was not a "subcontractor" within the meaning of the Vinson Act. In this it was sustained by the Board, which thereupon entered its decision that there was no deficiency (R. 29). In the case for the years 1937 and 1938, Docket No. 106,514 in the Board, the same argument was made and sustained, but deficiencies as to the petitioner's prime contracts were determined by the Board for those years (R. 29).

In both cases the petitioner had also contended that even if it were a "subcontractor", its "excess profit"

should not include any increment in the value of the materials used by it in performance of the contracts, occurring before March 27, 1934, the date of enactment of the Vinson Act (Appendix B, *infra,* pp. 40-41). The Board did not discuss or pass on this particular contention, but held that original cost must be used in computing the profit on the prime contracts. In the brief of this petitioner in the Circuit Court of Appeals, where it was respondent on review, the argument was renewed (Appendix B, *infra,* pp. 41-42). No question as to liability on the prime contracts was presented to the court. The Commissioner filed a reply brief discussing this argument on the merits, but not suggesting that the question was not open. The proposition that this petitioner had no right to urge the argument was not discussed by either party at the bar, but was originated and decided by the Circuit Court of Appeals in its opinion, in which it refused to consider the merits of the argument on the ground that the Board relevantly decided the question adversely to the petitioner and that the petitioner had not filed a petition for review.

As to the case for 1936, Docket No. 103,316, the decision of the Board was that there was no deficiency. How could the petitioner have sought review? Of what error could it have complained? The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *Helvering v. Lerner Stores Co.,* 314 U. S. 463, where it was declared (p. 466) that "a respondent, without filing a cross-petition, may urge in support of the judgment under review grounds rejected by the court below. *Langnes v. Green,* 282 U. S. 531, 538-539; *Public Service Commission v. Havemeyer,* 296 U. S. 506, 509; *McGoldrick v. Compagnie Generale Transatlantique,* 309 U. S. 430, 434."

As to the case for the years 1937 and 1938, Docket No. 106,514, there was a decision as to which this petitioner could have filed a petition for review. The ultimate question before the court, however, was whether for any reason raised in the Board of Tax Appeals and renewed before the court, the Board had erred in limiting the deficiencies to the amounts determined. The petitioner was entitled to show, on a ground actually presented to the Board, that the deficiencies should not be increased to the amounts sought by the Commissioner. The court held, however, that because the deficiencies were the result of a legal conclusion of the Board as to the meaning of "cost" as applied to the prime contracts, the petitioner was precluded from questioning the correctness of that legal conclusion as applied to the other contracts. In this the decision of the court is contrary to the decision of this Court in *LeTulle v. Scofield,* 308 U. S. 415. In that case the District Court had held an entire transaction to be a "reorganization" and had entered judgment against the Collector. On appeal, the Circuit Court of Appeals held that the transaction was a "reorganization" except as to certain assets transferred by the taxpayer individually to the transferor corporation as a preliminary to the transaction. This Court granted certiorari on the petition of the taxpayer; the Collector did not seek the writ. This Court thereupon held that the Collector could sustain the judgment to the extent favorable to him, on a ground repudiated by the Circuit Court of Appeals, namely, that the transaction was not to any extent a "reorganization". The judgment against the Collector, though based on a ground found by this Court to be wrong, was permitted to stand because he had not brought it under review. In the case at bar, the peti-

tioner did not seek reversal by the Circuit Court of Appeals of the decision against it for 1937 and 1938; it was entitled nevertheless to support that decision, to the extent that it was favorable, upon a legal ground inconsistent with the decision of the Board. That part of the decision against it may stand, though based on an error of law, just as did the judgment against the Collector in *LeTulle v. Scofield, supra.*

Neither *Helvering v. Pfeiffer,* 302 U. S. 247, nor *Ryerson v. United States,* 312 U. S. 405, cited by the Circuit Court of Appeals, supports its decision. In the *Pfeiffer* case, this Court held (at pp. 250-251) that "a decision below may be sustained, without a cross-appeal, although it was rested upon a wrong ground." And in the *Ryerson* case this Court held (at p. 408) that "even though the judgment below was rested upon the erroneous ground that the trusts were 'persons' * * *, the Government may justify the judgment here on the ground that * * * the gifts were of future interests."

4. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT IN THAT IT GIVES RETROACTIVE APPLICATION TO A STATUTE NOT PROVIDING FOR SUCH APPLICATION.

The question that the Circuit Court of Appeals refused to consider is one of substantial merit. The court's decision results in a retroactive application of the Vinson Act not required by its terms. A large part of the metal used in performing the contracts under dispute was on hand and owned by the petitioner on March 27, 1934, the date of passage of the Vinson Act. Much of the "excess profit" claimed by the Commissioner consisted of increment in value of the metal occurring

before that date. The Vinson Act calls for an outright taking rather than the imposition of a tax; yet this Court has repeatedly decided that, for the purpose of computing taxable gain, "cost" may not be less than the value of the thing sold on the effective date of the first statute taxing the income derived from the sale. *Doyle v. Mitchell Bros. Co.,* 247 U. S. 179; *Hays v. Gauley Mountain Coal Co.,* 247 U. S. 189; *United States v. Cleveland etc. Ry. Co.,* 247 U. S. 195; *Lynch v. Turrish,* 247 U. S. 221. The rule of construction for which the petitioner contends, and which the Circuit Court of Appeals refused to apply, is that applied in *Hassett v. Welch,* 303 U. S. 303, 314, as one of the "settled rules of statutory construction, which teach that a law is presumed in the absence of clear expression to the contrary to operate prospectively." "Tax statutes look to the future and not to the past": *Colgate-Palmolive-Peet Co. v. United States,* 320 U. S. 422, 424. The rule thus applied by this Court in income tax, estate tax and excise tax cases should also have been applied to a case involving liability under the Vinson Act.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted and that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted

PAUL G. RODEWALD
Attorney for the Petitioner

DAVID B. BUERGER,
Of Counsel.